damage suffered, the obligation is merely remedial. Applying this test, obviously the ordinary individual liability of stockholders is not penal.[3] On the other hand, where directors are made individually liable for the debts of the company when they have signed false certificates as to the amount of the capital stock paid in, the obligation seems clearly penal, and the holding of the Supreme Court of the United States to the contrary[4] is hard to defend. In a recent New York case the court dealt with a New Jersey statute which made the directors liable to the corporation for dividends declared and paid out of the capital stock. The court held that the obligation was not penal. *Hutchinson* v. *Stadler*, 85 N. Y. App. Div. 424. This view seems in accord with the test suggested.

Having established that an obligation is not penal, it still does not necessarily follow that it will be enforced in a foreign jurisdiction. Where a statute creates a right which did not exist at common law, and prescribes a remedy, this remedy is considered to be the only form of remedy which can be used,[5] on the theory that such was the intent of the legislature. This doctrine has been applied to corporation statutes of the sort under discussion.[6] Whenever, in a foreign jurisdiction, the enforcement of this prescribed remedy involves practical difficulties, a refusal to enforce it might well be justified. For example, where a foreign corporation and a large number of non-resident stockholders are necessary or desirable parties to the bill in equity which the statute prescribes, the court would refuse jurisdiction since it could not well control the parties.[7] Again, the local courts might be without the machinery to enforce the obligation imposed by the foreign law. This objection to enforcement, however, might be lessened by the existence of a similar local statute, in which case either the local machinery has been provided, or the courts have learned to do without it in dealing with the local cases. This consideration apparently influenced the judges in the case cited in the text. Their opinion leans to the side of enforcing such obligations, and this, in general, seems to be the better view.

RECOVERY IN AN ACTION OF DECEIT FOR EXPRESSION OF OPINION. — It is authoritatively laid down in the text-books and cases that in an action for deceit the false representations must be as to material facts, and that no liability is incurred for the mere expression of opinion.[1] The reason usually given for the rule is, that the law will not protect those who do not exercise ordinary prudence. It is apparent that this reason applies only to those few cases where it can fairly be said that the injured party was negligent in relying upon the statements of opinion. Even there, however, the reason seems objectionable, for it runs contrary to the fundamental rule of torts that contributory negligence is no defense to actions for intentional wrongs. It may of course be contended that that rule applies only to cases of physical injury, but on principle there appears no more reason why the law should require persons to guard against deception than against wilful physical injury.

---

[3] Hawthorne *v.* Calef, 2 Wall. (U. S.) 10.
[4] Huntington *v.* Attrill, 146 U. S. 657.
[5] Farmers, etc., Bank *v.* Dearing, 91 U. S. 29.
[6] Erickson *v.* Nesmith, 15 Gray (Mass.) 221.
[7] Erickson *v.* Nesmith, 4 Allen (Mass.) 233.

[1] 1 Bigelow, Fraud 473.

It is easy, however, to understand why in many cases recovery could not be allowed for false statements of opinion. The difficulty lies in proving one of the essential elements of the cause of action, the *scienter*, or fraudulent intent. To establish this point it is necessary to show that the defendant did not have an honest belief in the truth of his representations.[2] Where they consist of matter of fact, proof of their actual falsity is practically sufficient, but in case they were made as expression of opinion, it is necessary to prove that the defendant did not really have that opinion, to do which is obviously difficult. Another difficulty is that of proving reliance upon the statement of opinion by the party injured. This is particularly true in the case of "seller's talk" which consists largely in statements of opinion. Upon these grounds it may be urged that injustice might frequently be done by submitting such cases to a jury, which would often find fraud where there was none.

The cases plainly show, however, that the rule, though it doubtless exists, is often disregarded. Thus, where statements of opinion are made as resting upon knowledge,[3] or where the means of forming a correct opinion are within the reach of one party only,[4] the courts allow recovery. Even in cases of statement of value[5] and representation as to law,[6] where the rule is usually regarded as without exception, a defendant has been held liable by some courts when his moral obliquity was clearly made out to have been the cause of the plaintiff s injury. Further, the courts frequently avoid the rule by finding in a statement of opinion some implied representation of fact. A recent New Hampshire case is an example. A Christian Science "healer" represented to a patient suffering with appendicitis that he could cure her by Christian Science treatment, and that she did not need a surgical operation. The court followed previous New Hampshire decisions in holding that it should have been left to the jury to say whether there was not some representation of fact for which the defendant could be held liable. *Speed* v. *Tomlinson*, N. H. Sup. Ct., Oct. 6, 1903.

This is virtually submitting to them the real questions at issue, namely, the fraudulent intent of the defendant and the reliance of the plaintiff. In view of the fact that in almost no cases will the rule under consideration stand in the way of recovery by an injured party, when all the essential elements of a cause of action are present, it would seem that the rule itself is of little value.

PARTNERSHIP ASSOCIATIONS AS PARTIES TO ACTIONS. — Legislatures can of course create corporations which are recognized everywhere as legal entities. Whether similar entities are created when the legislature of a state confers the power of suing and being sued in an artificial name on other combinations of individuals, lacking some essential of a corporation, such as partnership associations, is an interesting question. If these statutes merely prescribe rules of procedure, it follows that they are of no force outside the state where passed. This is the view taken in Massachusetts.[1] A

---

[2] Derry *v.* Peek, 14 App. Cas. 337, 374.
[3] Cabot *v.* Christie, 42 Vt. 121.
[4] Hedin *v.* Minneapolis Med. & Surg. Inst., 62 Minn. 146.
[5] Bacon *v.* Frisbie, 15 Hun (N. Y.) 26.
[6] Townsend *v.* Cowles, 31 Ala. 428.

[1] Edwards *v.* Warren, etc., Works, 168 Mass. 564.